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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 1

JUNIUS IRVING SCALES,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF ON REARGUMENT

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In response to the Court's order for reargument of this case,[1] the government has taken positions, with respect to both the statutory question (the scope of the immunity provided by Section 4(f) of the Internal Security Act) and the constitutional questions, which are certainly more extreme than those it has espoused hitherto. Now the Court is advised[2] by the government that Congress may constitutionally proscribe membership in the Communist Party even on the part of those who wish "to divert the organization from its existing unlawful program" or whose sole motive is the enactment of social legislation. So, too, the government suggests[3] that the "clear and present dan-

[1]Order of June 29, 1959, set forth in Petitioner's Supplemental Brief on Reargument (hereinafter cited as "Pet. Rearg."), Appendix A. Petitioner's Brief and Reply Brief previously filed are cited respectively as "Pet. Br." and "Pet. Rep. Br." The government's initial Brief is cited as "Govt. Br." and its Brief on Reargument as "Govt. Rearg."

[2]Govt. Rearg. pp. 7-8.

[3]Govt. Rearg. pp. 29-31.

ger" standard may now be scrapped "... where Congress has dealt directly with aspects of speech, as it has here ...", at least if there is specific intent to bring about what is advocated.

It is hardly surprising that these propositions are put forward with some diffidence, and with no apparent confidence that they will win the approval of this Court. Essentially if not formally, the government's arguments are the same as those previously advanced. No attempt is made to imbue Section 4(f) of the Internal Security Act with any meaningful content, and no serious effort to support the constitutionality of the membership clause as Congress enacted it, without the additional language with which the government hopes to shore it up.

The government's brief is notable for its extensive reliance on arguments constructed and developed in disregard of circumstances which, once noted, are destructive of its position. Thus, for example:

(1) The government persists in describing Section 4(f) of the Internal Security Act as limited to "mere" or "naked" membership, an interpretation which is totally inconsistent with the presence of the words "the holding of office" in the statutory language.

(2) The interpretation of "member" in the membership clause as meaning only "active" (as well as "high-level", "quasi-military", etc.) membership is indefensible, once attention is given to the fact that the clause also covers one who "affiliates" with a subversive organization.

(3) The argument for judicial interpolation of specific intent in the membership clause is advanced without regard for Congress' amendatory insertion of knowledge only, after prolonged consultation with the Solicitor General and others who knew full well how

to require specific intent, if that had been the legislative purpose.

These and a few related matters are discussed in the remainder of this brief.

I. Section 4(f) of the Internal Security Act. In its several briefs in this case the government has repeatedly asserted that Section 4(f) grants immunity from prosecution only on the basis of "mere" or "naked" membership "without more."[4] But in examining the meaning of the expression "per se" on which the government relies, the first place to look is at the language of Section 4(f) itself, and this immediately yields the information that its coverage is not restricted to "membership" but also embraces "the holding of office". By its own explicit language, therefore, the statutory immunity extends beyond "mere" or "naked" membership, and applies to members engaging in the activities of, and possessing the knowledge which may normally be attributed to, officers of the Communist Party.

The government strongly relied on the petitioner's office-holding as proof of his guilty knowledge,[5] and takes the position that[6] "'. . . office holding, as we admit, is itself 'strong evidence' of knowledge of the Party's aims.'" If that is so, the immunity granted by Section 4(f) is at least coextensive with the elements of the crime of membership as defined in the membership clause. Belatedly struggling with this inevitable inference, the government is forced to argue[7] that Congress extended the immunity to Communist officers "even though it believed it [the exemption] would have little or no application", because "no harm would be

[4] *E.g.* Govt. Br. pp. 30, 70, and 74.
[5] Govt. Br. p. 85.
[6] Govt. Reargt. p. 36.
[7] *Id.*, pp. 36-37.

done by exempting such a person (*i.e.*, the ignorant official) from the criminal law and it might help to sustain the constitutionality of the Internal Security Act."

The government suggests no reason why "the holding of office" should be given so restricted and unreal a meaning, and advances no justification for the consequent frustration of Congressional intent. It is true, as the government states[8], that Section 4(f) is an immunity-from-prosecution, not an exemption-from-registration, provision. But, as the government acknowledges[9], the purpose of the immunity grant is to "bolster" the validity and efficacy of the registration provisions of the Internal Security Act, by removing the basis for their obstruction by pleas of self-incrimination.

Whether or not Section 4(f), construed in accordance with its language in the light of the Congregational purpose, is sufficient to accomplish that purpose, is not the question.[10] This Court has squarely and unanimously rejected the argument that a Congressional grant of evidentiary protection should be narrowly construed because of its insufficiency for constitutional purposes. *Adams* v. *Maryland*, 347 U. S. 179; see also *United States* v. *Bryan*, 339 U. S. 323, 337.

In enacting Section 4(f), Congress intended to exempt Communist Party officers and members from prosecution under the membership clause, and to require that accusations under the other provisions of the Smith Act and of the Internal Security Act be based on charges of conduct, other than membership, proscribed as criminal therein. The Internal Security Act in general and Section 4(f) in particular embody a Congressional decision to deal with Communist office-holding and membership by registration rather

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[8] *Id.*, pp. 35-36.

[9] *Id.* p. 35.

[10] *Cf. Communist Party* v. *Subversive Activities Control Board*, No. 12 at the current term of Court.

than prosecution. The government has shown no reason why this Court should not give effect to that decision by ordering the dismissal of this indictment for failure to state an offense.

2. *Unconstitutionality of the Membership Clause.* The government seeks to draw this case under the constitutional umbrella of the *Dennis* case by describing[11] the membership clause and the "organizing" proscription of the Smith Act as "two parallel provisions" which cannot "have different constitutional results." This argument confuses proximity with similarity. The "organizing" provision punishes the individual for his own participation in the forbidden advocacy by organizing a group that engages in it. The membership clause makes the accused criminally liable for the advocacy of others, and is unconstitutional because, under the due process clause, membership is too remote an association to warrant imposing criminal responsibility for the conduct of other members[12], and under the First Amend-

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[11]Govt. Rearg. p. 20.

[12]The government suggests (*Id.* p. 10 note 6) that *Whitney* v. *California*, 274 U. S. 357, supports the imposition of criminal liability for membership in a subversive organization, based on the assumption that the "present serious crimes" referred to in Mr. Justice Brandeis' concurring opinion (274 U. S. at 379) were, in the government's words, "acts of the Party to which the petitioner was connected through her membership."

But Justice Brandeis' opinion expressly states (*Ibid.*) that the "serious crimes" were not those of the Communist Labor Party, of which Miss Whitney was a member, but of the International Workers of the World, and the record clearly discloses that the crimes which the Justice had in mind were such things as the spreading of incendiary bombs and poison on farms and emery dust in factories. The majority opinion in the *Whitney* case emphasizes (274 U. S. at 363-66) that Miss Whitney was chairman of the credentials committee and a member of the resolutions committee at the Communist Labor Party's organizational convention in California. That Party's program included an endorsement of the "revolutionary" activities of the I. W. W., and Miss Whitney herself was in close contact with members of the I. W. W. who had been arrested on charges of criminal

ment, membership in a group (absent a charge of conspiracy) is conduct too far removed from the forbidden advocacy to constitute a clear and present danger. The circumstance that the membership clause and the organizing provision are adjacent and grammatically connected is, of course, irrelevant.

Although the questions in the Court's order of June 29, 1959 have now obliged the government to take a formal position in support of the constitutionality of the membership clause as it is written, the brief still relies chiefly on the amendatory limitations previously proposed. These include not only the proposed new elements of specific intent (charged in the indictment) and "activity" (not so charged) of which the Court has taken cognizance in its order for reargument, but also the other qualifications suggested by the government, both in its initial presentation ("purposive", "rigidly disciplined", "high level", "quasi-military", and "deeply conspirational")[13] and on reargument ("dedicated", "full-time", and "proselytizing").[14]

As petitioner has previously pointed out,[15] this is simply an effort on the government's part to redeem the constitutional inadequacy of the statute and the indictment, by stressing what the record is supposed to show about the petitioner individually. In its latest brief, the government even argues that this is a proper method of constitutional analysis.[16]

It is of course true that the Court tests the constitutionality of criminal statutes in terms of the case that presents itself, and not of "some hypothetical case" or of "some

activity. See the Brief of Defendant-in-Error on Rehearing in No. 3, October Term, 1925, pp. 9-14. Therefore, Miss Whitney's connection with the "present serious crimes" was not solely as a "member" of the Communist Labor Party, but as an organizer of a group and participant in a meeting that advocated those crimes.

[13]Gov't. Br. pp. 48-49, 52-53, and 56; Pet. Rep. Br. pp. 2-3.

[14]Gov't Rearg. p. 27.

[15]Pet. Rep. Br. p. 3 note 6.

[16]Govt. Rearg. pp. 26-28.

other individual not before the Court."[17] But this does not mean that a statute, unconstitutional on its face, may be saved because a constitutional statute might be drawn if limited to facts such as those thought to have been proved in the particular case.[18]

The government's struggle for an artificially limited interpretation of the membership clause, like its similar effort to restrict Section 4(f) of the Internal Security Act, is waged in defiance of the language itself. One may read all of the government's briefs in this case without encountering discussion of the fact that the clause covers not only a "member" of but also one who "affiliates with" a subversive group.[19]

It is true, of course, that the constitutionality of the membership clause insofar as it proscribes affiliation is not now before the Court. But that does not mean that this phrase may be overlooked when the construction of the clause as a whole is in question. Since Congress intended to punish affiliation, it plainly did not intend its prohibition of membership to be limited in ways that could not possibly apply to affiliation.

The term "affiliates" as used in a criminal statute no doubt approaches if it does not cross the line of fatal imprecision.[20] Plainly, however, it was intended to cover a

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[17] *Id.* p. 27.

[18] Pet. Rearg. pp. 4-11. If in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, the defendant had charged twenty dollars instead of twenty cents for a pound of sugar, that would not have rescued the statute there in question, even though a constitutional statute suffiicently describing conduct such as that supposed might readily have been drawn by adding qualifications and specifications to the statute before the Court. See *Trop* v. *Dulles*, 356 U. S. 86, 118 (Mr. Justice Frankfurter, dissenting): "Rigorously as we are admonished to avoid consideration of constitutional issues if statutory disposition is available, it would do violence to what this statute compelling conveys to draw from it a meaning other than what it spontaneously reveals."

[19] Pet. Rep. Br. pp. 3-4; Pet. Rearg. p. 21.

[20] *United States* v. *Reimer*, 79 F. 2d 315, 317 (C. A. 2); *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247, 262 (C. A. 7).

looser and lesser degree of connection than membership.[21] Equally plainly, it comprehends a lesser amount of organizational activity than does membership.[22] It is inconceivable, therefore, that Congress intended the word "member" to be limited by qualifying adjectives such as those that the government has constantly employed in this proceeding.[23]

In its argument that specific intent to overthrow the government should be read into the membership clause,[24] the government continues to ignore the fact that Congress added to the membership clause, by amendment to the bill that became the Smith Act, the requirement of knowledge of the organization's unlawful purposes. As previously indicated,[25] the purpose of the amendment was to avoid earlier interpretations of comparable state statutes in which the element of *mens rea* had been deemed unnecessary. This limitation being thus assured by specific amendment, it cannot be convincingly argued that the more stringent and un-

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[21]See *Bridges* v. *Wixon*, 326 U. S. 135, 143: "Affiliation . . . imports . . . less than membership but more than sympathy."

[22]In *Bryson* v. *United States*, 243 F. 2d 837 (C. A. 9), which arose under the Taft-Hartley law, the court declined to say whether "member" as used in the Smith Act requires "activity", but observed (243 F. 2d at 839) that: "Affiliation is a relationship which can exist even when not manifested by activity."

[23]The government appears to have embraced the view of the Court of Appeals for the Ninth Circuit that "affiliation" does not necessarily involve activity. See the Solicitor-General's Brief in Opposition to the petition for certiorari in *Bryson* v. *United States* (No. 1065, October Term 1956) p. 13.

[24]The government again invokes the *Whitney* case (Govt. Rearg. pp. 9-10 and 15) to support its argument that the membership claim is constitutional *without* specific intent. But its analysis will not bear comparison with the majority opinion in the case which, dealing with Miss Whitney's contention that she did not personally favor violence, said (274 U. S. at 367-68) that the issue of her intent was not open to review in this Court, that it was foreclosed by the verdict, and that her contention ". . . entirely disregards the facts . . . " showing her unlawful intent.

[25]Pet. Rearg. pp. 13-14 and 17-18.

usual requirement of specific intent may be derived from the language by implication.[26]

Even if specific intent were to be added to the membership clause by judicial amendment, its constitutionality would not be strengthened. The government continues to argue[27] that the charge here is substantially the same as the conspiracy charge in the *Dennis* case, on the theory that subversive intent coupled with Party activity is the equivalent of the agreement to pursue an unlawful objective in concert, which is the core of a criminal conspiracy.[28]

The government's view finds no support in the decisions of this Court, and has recently been rejected by the Council of the American Law Institute which, after consideration of this specific point, decided that "agreement" should remain, as it always has been, the essential element of conspiracy.[29] Unlawful purpose coupled with activity in support of those pursuing it may be the basis for a charge of complicity in or attempt to commit the substantive offense, but is insufficient to support a charge of conspiracy.

The government's argument[30] that even lawful Party activity aids the Party's illegal purposes, and therefore may be treated as an element of the crime charged here, is directly contrary to *De Jonge* v. *Oregon*, 299 U. S. 353. Lawful

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[26]Compare the language of the "membership clause" of the Communist Control Act of 1954 (50 U. S. C. 843, Pet. Br. 5a), which includes the phrase "knowingly and willfully".

[27]Govt. Br. pp. 47-56; Govt. Rearg. pp. 20 and 23.

[28]The government's reliance (Govt. Br. pp. 49-50; Govt. Rearg. 29-30) on Mr. Justice Jackson's concurring opinion in the *Douds* case (339 U. S. 382, at 431-32) is misplaced. Justice Jackson did not say, as the government suggests, that a charge of Communist Party membership is equivalent to a charge of conspiracy. He said, rather, that members of the Communist Party might be "chargeable, on ordinary conspiracy principles, with responsibility for . . . the party's program." That is precisely the charge in the *Dennis* case, and is precisely not the charge in the present case.

[29]The American Law Institute, Model Penal Code, Tentative Draft No. 10 (May 6, 1960) pp. 19-20, 108-109 (wherein the views of the late Judge Parker as stated in the opinion in this very case, 227 F. 2d 581 at 587, are rejected), and 116-17.

[30]Govt. Rearg. pp. 23-25.

speech and assembly are protected by the First Amendment even if the organizational auspices are subversive, and the charge here of membership is not significantly different, in First Amendment terms, from the charge which was laid against De Jonge. The government's effort to distinguish the *De Jonge* case[31] on the ground that there the indictment charged no activity other than "his assistance in the conduct of a meeting" is breathtaking, since in the present case the government relies chiefly on "intent", which is not specified in the statute, and "activity", which is specified in neither the statute nor the indictment.[32]

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[31] *Id.* pp. 25 and 28.

[32] In the *De Jonge* case counsel for the appellee (State of Oregon) attempted in this Court to do just what the government attempts in the present case—i.e., to pitch the constitutional issue not on the statute and indictment but on circumstances extraneous to both. In the *De Jonge* case it was urged on this Court (Appellee's Brief, No. 123, October Term 1936, pp. 30-31) that De Jonge, in his speech at the meeting, had discussed the activities of the Young Communist League, urged the audience to attend a Communist meeting the next day in order to show defiance of the police and assist the Communist Party in its revolutionary tactics, and solicited new members for the Communist Party. All these matters lay outside the indictment and were disregarded by the Court, which should equally disregard the government's effort here to bolster the constitutionality of the statute by invoking evidence that the petitioner was "high level", "active", or "proselytizing" or that the Communist Party is "deeply conspirational".